ARTHUR LEE MENG KWANG

v.

FABER MERLIN (M) BHD. & ORS.

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
SYED AGIL BARAKBAH SCJ
WAN HAMZAH SCJ
[CIVIL APPLICATION NO. 5 OF 1986]
20 MARCH 1986

CIVIL PROCEDURE: *Setting aside - Ex parte order - Leave to commence committal proceedings - Order 52 r. 2 of Rules of the High Court - Rule 4 of Supreme Court Rules 1980 - Distinction between procedural and substantive objections.*

This is an application by Arthur Lee Meng Kwang (hereinafter referred to as "the advocate") for an order to set aside, firstly the *ex parte* order of this court dated 4 July 1985 granting Faber Merlin Malaysia Bhd. and two others (hereinafter referred to as "the complainants") leave to commence committal proceedings for contempt under O. 52 r. 2 of the Rules of the High Court (hereinafter referred to as the "RHC") read with r. 4 of the Rules of the Supreme Court 1980 (hereinafter referred to as the "RSC") and secondly, the notice of motion filed on 16 July 1985 pursuant to the said leave, vide Supreme Court Civil Application No. 7/85.

Various objections have been raised by counsel for the advocate and these are classified under two headings, procedural and substantive. The allegations are summarised in the following manner:

Procedural objections:

1. The motion does not state that it has been issued pursuant to leave granted on 1 July 1985.
2. No statement was before the Court on the date when leave was granted.
3. The original documents in the *ex parte* application including the affidavit in support were not served on the advocate.
4. The leave has lapsed under O. 52 r. 3(2) RHC.
5. There was non-observance of r. 71(3) RSC.

Substantive objections:

6. The complainants have no *locus standi*.
7. There was an adjudication on 4 July 1985 and the order granting leave was a nullity for the reasons set out in the affidavit.
8. The charge has not been sufficiently particularised.

Held:

[1] There is a distinction in principle between cases where there have been non-observance of some safeguards laid down in O. 52 of the RHC in the interest of the alleged contemnor, and a mere technical irregularity. The former is fatal and the latter is not. See In *re B (JA)(An Infant)* [1965] 1 Ch. 1112. This is the correct principle to be applied in all contempt proceedings

under O. 52 RHC which, it must be noted, is distinct from summary contempt procedure which is normally resorted to only in urgent and imperative cases, where the contempt is committed in the face of the Court (*Cheah Cheng Hoc v. PP FCCRA* 28/84).

[2] Applying the above principle, alleged defects Nos. 1 and 3 are of such a nature that they are mere technical irregularities. On No. 2, after perusal of the relevant Court file and records, the Court is satisfied that the statement was before the Court during the hearing of the *ex parte* application in July. On No. 4, the Court held that the words "entered for hearing" in O. 52 r. 3(2) also mean the filing of the notice of motion and therefore, in the circumstances, leave has not lapsed since the motion was filed on 16 July 1985, within 14 days after leave was granted. With regard to no. 5, the general provision in r. 71(3) in relation to filing of applications was held not to apply in view of the specific provisions in O. 52 read with r. 4 RSC.

[3] The complainants and their advocates and solicitors have sufficient interest in this matter to give them *locus standi* - see *MBf Holdings Bhd. v. Emtex Corporation Bhd. SCCA.* 213/85 and *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177.

[4] Objection No. 7 was that the order granting leave is null and void because the Lord President who subsequently presided at the hearing of the application for leave had earlier "personally complained to and made known to the Bar Council, Malaysia, His Lordship's views of the merits of the very issue before this Honourable Court". The Court held that there was no merit in this allegation as the letter written by the Lord President was an administrative communication which is distinct from the present contempt proceedings initiated by the complainants. Counsel for the advocate was also unable to cite any authority for the proposition that the hearing of the *ex parte* leave application is an adjudication in the real sense of the word. Having regard to the prominence given by the Constitution on the Court's power to deal with contempt of itself and in the light of the special nature of the contempt proceeding itself as indicated in *Sher Singh v. PP Kapur* [1968] Punj. 217 at 223, and having regard to all the circumstances of this case, the Court held that there could not be any bias or likelihood of a bias.

[5] As regards complaint No. 8, having regard to the contents of the letters which was referred to in the statement and exhibited in the verifying affidavit, it is sufficient for the advocate to know that the alleged contempt is against him and to enable him to meet the charge and prepare his defence.

[Applicant's application dismissed with costs.]

Cases referred to:
In re B (JA) (An Infant) [1965] 1 Ch 1112
Sher Singh v. PP Kapur [1968] Punj 217
Tan Sri Haji Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177
Jelson (Estates) Ltd. v. Harvey [1984] 1 All ER 12

Legislation referred to:
Courts of Judicature Act 1964, ss. 13, 16
Federal Constitution, art. 126
Rules of the High Court 1980, O. 52, rr. 2, 3(2), (4)
Rules of the Supreme Court 1980, rr. 4, 71(3)

For the applicant - Humfrey Ball (Yap Siong Cheng with him); M/s. Arthur Lee & Co.
For the respondents - G. Sri Ram; M/s. Sri Ram, Zulkifly & Kumar

JUDGMENT

Mohd. Azmi SCJ:

This is an application of Mr. Arthur Lee Meng Kwang (hereinafter referred to as "the advocate") for an order to set aside firstly, the *ex parte* order of this Court dated 4 July 1985 granting Faber Merlin Malaysia Bhd. and two others (hereinafter referred to as "the complainants") leave to commence committal proceeding for contempt under O. 52 r. 2 RHC read with r. 4 RSC 1980, and also secondly, the notice of motion filed on 16 July 1985 pursuant to the said leave, vide Supreme Court Civil Application No. 7/85.

Various objections have been raised by Mr. Humfrey Ball, Counsel for the advocate which may conveniently be classified under two headings, *viz.* procedural and substantive.

On procedural objections, the following are the summary of the alleged principal defects:

(1) The motion does not state that it has been issued pursuant to leave granted on 4 July 1985.

(2) No statement was before the Court on the date when leave was granted.

(3) The original documents in the *ex parte* application including the affidavit in support were not served on the advocate.

(4) The leave has lapsed under O. 52 r. 3(2) RHC.

(5) There was non-observance of r. 71(3) RSC 1980.

On substantive objections, the three defects alleged are:

(1) The complainants have no *locus standi*.

(2) There was an adjudication on 4 July 1985 and the order granting leave was a nullity for the reasons set out in the affidavit.

(3) The charge has not been sufficiently particularised.

Before dealing with these objections we think the following statement of principle in the judgment of Cross J *In re B. (JA) (An Infant)* [1965] 1 Ch 1112 is relevant for the purpose of this case:

> Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.
>
> It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor v. Roe,* if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits.

> When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question - cases where the documents do not comply strictly with the rules, but it is impossible that in any conceivable case the contemnor could be in any way prejudiced by the defects - then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would be in any other proceeding.

There is therefore a distinction in principle between cases where there have been non-observance of some safeguards laid down in O. 52 RHC in the interest of the alleged contemnor, and a mere technical irregularity. Whilst the former is fatal, the latter is not. In our opinion, that is the correct principle to be applied in all contempt proceedings under O. 52 RHC, which, it must be noted, is distinct from summary contempt procedure which is normally resorted to only in urgent and imperative cases, where the contempt is committed in the face of the Court. (See *Cheah Cheng Hoc v. PP FCCRA* 28/84). Applying the above principle to the procedural objections raised in the present case, we are of the view that the alleged defects Nos. (1) and (3) are of such a nature that they are mere technical irregularities. In the case of defect No. (1), the omission to state in the motion that it is issued pursuant to the leave granted is not fatal for the simple reason that no such motion could have been issued without leave. Further the extracted order granting leave was subsequently served on the advocate well before 7 February 1986, the date of filing of the present application. In the circumstances, no safeguard provision of O. 52 has been breached. As regards defect No. (3), the advocate was in fact served with the notice of motion (A2) together with verifying affidavit and relevant documents on 20 November 1985 notwithstanding the discretion of the Court to dispense with such service under O. 52 r. 3(4). The contents of the verifying affidavit and the relevant documents in the *ex parte* application (A1) are exactly the same as those in the notice of motion (A2). The service cannot be held to be bad merely because of difference in pagination and in the date of affidavits as they are irregularities which do not prejudice the advocate. As regards Nos. (2), (4) and (5), we are not satisfied that the objections are well founded. On No. (2), we are appalled at the serious allegation made. It is mere conjecture on the part of the advocate that the granting of leave by the Court was made in the absence of a statutory statement. After perusal of the relevant Court file and records, in particular the praecipe dated June 14 1985 stamped on the statement, we are satisfied that the statement was before the Court during the hearing of the *ex parte* application in July. With regard to No. (4), Mr. Humfrey Ball argues that the meaning of words "entered for hearing" appearing in O. 52 r. 3(2) is the date on which the Registrar fixed the date of hearing, i.e. 9 November 1985. (See letter 'JJ' in Bundle B1). We do not agree. In our judgment, having regard to the practice of our Court, the words "entered for hearing" in that sub-rule, also means the filing of the notice of motion. In the circumstances, the leave has not lapsed since the motion was filed on 16 July 1985, i.e. within 14 days after leave was granted. As regards No. (5), we rule that the general provision in r. 71(3) RSC regarding filing of applications does not apply in view of the specific provisions in O. 52 RHC read with r. 4 RSC.

Next, we deal with the substantive objections. Firstly, on *locus standi*, we think the following passage in the judgment of Mehar Singh CJ in *Sher Singh v. PP Kapur* [1968] Punj 217 is pertinent:

> A contempt of Court is basically an offence against the Court and not against the Judge personally and it is punishable because of the necessity of maintaining the dignity of and respect towards the Court. The power to punish for a contempt is exercised to vindicate the Court's dignity. Law reports are full of judicial decisions explaining the true purpose and wide scope and effect of the power of the superior Courts to punish for contempt and also

> the limits within which a litigant is entitled to insinuate against the Courts. This power quite clearly does not depend on the personal desire of a private party whether or not to pursue the proceedings for contempt even though initiated by it. Proceedings for contempt are undisputably of quasi criminal nature. The death of the party initiating contempt proceedings would, therefore, seem to us to be of the least import. Once the proceedings get going, it quite clearly becomes a matter between contemner on the one hand, and, the Court, of which the contempt is stated to have been committed, on the other. Contempt of Court, if I may so put it, is a mysterious and indefinable offence, being as easy to commit as it is liable to speedy and deserved punishment. Since the foundation of our present judicial system to punish for contempt is really regarded as 'of its own class' (*sui generis*). In order to keep the Courts of justice free, impartial and objective, Courts by their very creation, are vested with the inherent power, *inter alia,* to preserve themselves from the approach of pollution however subtly designed. With the death of the person approaching this Court with the allegation of someone having committed contempt of Court, therefore the proceedings cannot be held to cease to be competent.

In this country, the need to protect the dignity and integrity of the Supreme Court and the High Courts is recognised by art. 126 of the Federal Constitution, and similar provision is repeated in s. 13 of the Courts of Judicature Act 1964. Thus, unlike in England where there is no written constitution, the jurisdiction of this Court to deal with contempt of itself is conferred by the supreme law of Malaysia. Until different rules are made under s. 16 of the Courts of Judicature Act, the procedure for contempt proceedings in the Supreme Court is governed by O. 52 of the Rules of the High Court 1980 read with r. 4 of the Rules of the Supreme Court. In addition, the Court can adopt summary contempt procedure on its own motion in cases where it is urgent and imperative to act immediately against contumelious conduct committed during its proceedings. When the contempt is not committed in the face of the Court, as is the case alleged here, it is equally important that the dignity and integrity of the Court be protected and preserved, and in such cases the contempt proceedings may be initiated by motion either by the Attorney-General or any private party who has sufficient interest in the matter, or even by the Court itself, although in practice it seems unjust to expect the Court to protect itself by being both complainant and Judge, save in the unlikely event of the Attorney-General or the appropriate private party declining to act. In this case, the complainants are the successful parties in the two civil appeals, from which the present contempt proceeding arose. Surely, the complainants and their advocates and solicitors have sufficient interest in this matter to give them *locus standi*. (See also *MBf Holdings Bhd. v. Emtex Corporation Bhd. SCCA* 213/85; and *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177).

Secondly, Counsel for the advocate submits that the order granting leave is null and void because the Lord President who subsequently presided at the hearing of the application for leave, and earlier "personally complained to and made known to the Bar Council Malaysia, His Lordship's views of the merits of the very issue before this Honourable Court". We see no merit in this allegation. The letter written by the Honourable the Lord President to the President, Bar Council, is an administrative communication and marked "SULIT", which is distinct from the present contempt proceeding initiated by the complainants. Further, Mr. Humfrey Ball is unable to cite any authority for the proposition that the hearing of the *ex parte* leave application is an adjudication in the real sense of the word. The only case cited before us on this point is *Jelson (Estates) Ltd. v. Harvey* [1984] 1 All ER 12 which, in our opinion, does not assist his proposition. Having regard to the prominence given by the Constitution on the Court's power to deal with contempt of itself, and in the light of the special nature of the contempt proceeding itself as indicated in *Sher Singh case* (*ante*), and

having regard to all the circumstances of this case, we hold that there could not be any bias or likelihood of a bias. Not that it would make any difference to our conclusion, it should also be observed that the panel of the Court that granted the leave was different from the one that heard the appeals. If anything, this shows that the Court has acted with great restraint notwithstanding its wide powers. Lastly, as regards the complaint that the charge in the statement is defective in that it lacks particulars, we note that the alleged contempt in the statement is in the writing of the four letters by the advocate himself to the appellate Judges either directly or copied to them and others. Having regard to the contents of the letters which are referred to in the statement and exhibited in the verifying affidavit, we find it is sufficient for the advocate to know what the alleged contempt is against him, and to enable him to meet the charge and prepare his defence.

In the circumstances, we dismiss with costs the advocate's application to set aside the leave and the notice of motion.

Also found at [1986] 2 CLJ 109